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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 212

CRANE COMPANY,

Petitioner,

—v.—

WESTINGHOUSE AIR BRAKE COMPANY, A. KING MCCORD, EDWARD J. HANLEY, EDWIN HODGE, JR., FRANK L. MAGEE, JOHN A. MAYER, G. ALBERT SHOEMAKER, ERIC A. WALKER, LAWRENCE E. WALKLEY, JAY V. WILCOX, LESLIE B. WORTHINGTON, AMERICAN STANDARD and BLYTH & CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 2, 1970

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Crane Company (hereinafter "Crane") petitions for a writ of certiorari to review that part of the order and judgment of the United States Court of Appeals for the Second Circuit which affirmed the District Court's dismissal after trial of the consolidated complaint brought under Sections 9, 10 and 14 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i, 78j, 78n, and Rules 10b-5 and 14a-9 thereunder, 17 C.F.R. §§ 240.10b-5 and 240.14a-9.

Opinions Below

The opinion of the Court of Appeals (Appendix A, infra, pp. 1a-31a) is reported at 419 F.2d 787 (2nd Cir. December 10, 1969). The opinion of the District Court (Appendix B, infra, pp. 32a-48a) is reported at CCH Fed. Sec. L. Rep. ¶ 92,228 (S.D.N.Y., June 5, 1968). The opinion of the District Court denying Crane's application for a preliminary injunction is unreported. (May 31, 1968) (Appendix C, infra, pp. 49a-56a)

Jurisdiction

The judgment of the Court of Appeals was entered on December 10, 1969. On December 24, 1969, American Standard, Inc. filed a timely petition for rehearing or rehearing *en banc*. On March 4, 1970 the Court of Appeals denied this petition without opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Under Rule 14a-9 of the Securities Exchange Commission is a fact material only if it would influence the vote of a stockholder?

2. Under Rule 14a-9 must corporate directors in recommending to their stockholders approval of a merger into Company A for the purpose of preventing a takeover of their company by Company B:

   (i) expressly state that the merger is to prevent such a takeover; and,

(ii) disclose reliable information known only to the directors showing that apart from the prevention of the threatened takeover, the recommended merger would be adverse to the interests of the company's stockholders?

3. Under Rule 14a-9 must corporate directors, in seeking the approval of their stockholders of a merger into Company A to prevent a takeover of their company by Company B, disclose that Company A in concert with their company had, in order to deter shareholders from tendering their shares in response to a tender offer from Company B, artificially inflated the market price of their company's stock by manipulative wash sales?

Statutes and Rules Involved

Section 10(b) of the Securities Exchange Act (See App. D)

Section 14(a) of the Securities Exchange Act (See App. E)

Rule 10b-5 (See App. F)

Rule 14a-9 (See App. G)

Statement of the Case

This action arises out of a year-long struggle (June 15, 1967 to June 7, 1968) by Crane to obtain control of Westinghouse Air Brake Company ("Air Brake") which was defeated by Air Brake's defensive merger on June 7, 1968 into Crane's principal competitor in the plumbing indus-

try, American Standard, Inc. ("Standard"). In 1967 Crane had approximately 10,000 stockholders and sales of over $403,000,000 (Complaint, ¶ 2). Air Brake had approximately 35,000 stockholders and sales of $305,000,000 (id., ¶ 3); Standard had over 54,000 stockholders and sales of approximately $600,000,000 (id., ¶ 5).

Crane commenced buying Air Brake stock as a preliminary to a proposed Air Brake/Crane merger on June 15, 1967. (Ex. 1) In August, Crane proposed merger discussions with Air Brake. (Ex. 2) However, Air Brake's Chairman concluded on the basis of a report of Air Brake's Financial Vice-President that Air Brake itself had all the resources necessary to develop a strong and increasingly profitable business, had key people in good positions, a good balance sheet, improved physical plant and tools, had favorable trends and strong long-term prospects in its major markets and that "the last five years had been good and the next five years should be even better." (Dep. Ex. 18; McCord Ex. 25-A, pp. 57-63) In November, Air Brake rejected a possible merger in Crane in reliance in part upon a report of an independent consulting firm, A. T. Kearney & Co. (Ex. 3; Dep. Ex. 109; Dep. Ex. 9, p. 37) Crane continued to buy Air Brake stock. By December 1, Crane owned enough shares to elect one director to the ten man Air Brake board under cumulative voting. (Ex. 1) Air Brake's management thereupon changed the by-laws to increase the number of shares required to elect a director in order to prevent Crane from obtaining representation. (McCord Ex. 25-A, pp. 111-113; Wadsworth Ex. 25-K, p. 10) Later in December, Air Brake refused Crane's demand to inspect the Air Brake list of stockholders (Ex. 25-A, pp. 117-118) and in January 1968, its

chairman stated under oath that Air Brake's interest was to remain independent and not merge with any company. (id., pp. 135-137) On January 15, 1968, A. T. Kearney submitted to Air Brake at the latter's request a study of Crane's principal product line, plumbing, for the express purpose of furnishing Air Brake with information to use in communicating with its stockholders in opposing an anticipated Crane takeover attempt. (Dep. Ex. 137) This study compared Air Brake's sales' growth with those of Crane and Standard, the largest company in the plumbing industry, and concluded that the plumbing industry, which comprised 40% of Crane's business and 75% of Standard's business, was less desirable because of a lower growth potential than the industries in which Air Brake competed, and that a merger of Air Brake into Crane or Standard would involve the Air Brake shareholders in "an averaging downward in growth opportunities under a merged situation."

Crane continued to purchase Air Brake stock (Ex. 1), and on February 20, 1968 filed its 14B statements with the SEC declaring its intention to solicit proxies to elect directors to the Air Brake Board. (Ex. 25-C, p. 380) By February 20, Air Brake's Chairman had concluded that if necessary to prevent a Crane takeover of Air Brake, a merger of Air Brake into another company would be desirable. (Ex. 25-C, pp. 389-390) On February 20, Air Brake's Chairman and several of the Air Brake directors met and decided that Air Brake, in order to prevent a Crane takeover, should merge into Standard. (Mayer Ex. 25-E, pp. 74-91) They knew Standard was the largest company in the plumbing business and was Crane's largest competitor. (id., p. 87) They recognized that the effect

of merging Air Brake into Standard would be to prevent a Crane takeover and would, for antitrust reasons, force Crane out of Standard. (id., pp. 87-88) Standard's petition for rehearing to the Court of Appeals described the merger in the following terms: "Here a target corporation turned to Standard for defensive help by way of a negotiated merger" (p. 1).

On March 4, 1968, Air Brake's directors and Standard's directors approved an agreement for a merger of Air Brake into Standard. (Dep. Ex. 93) At that meeting they were furnished with certain internal financial statements of Standard (Dep. Ex. 118) which indicated that Standard's 1967 earnings, apart from those derived from a company (Mosler) acquired in 1967 representing 8% of Standard's sales and a non-recurring war loss recovery, had declined for the fourth consecutive year (Internal Exhibit III of Dep. Ex. 118*) and that Standard had failed to reach its 1967 sales objectives by $35 million and its earnings objectives by $5 million. (Internal Exhibits III, IIIA and IIIB of Dep. Ex. 118; Ex. 25-L, pp. 326-29)

In the week of April 8th, Crane's registered offer to exchange Crane's securities for Air Brake's securities became effective and was to expire, unless extended, at 5:00 P.M. on April 19, 1968. In that same week, Air Brake

* The chart referred to showed that Standard's total income from U.S. and foreign operations, including a non-recurring war loss recovery of $1,246,000, was $11,297,000 as opposed to $10,347,000 in 1966. Without the non-recurring war loss recovery, which in the proxy statement was taken out of income from operations and listed as an extraordinary item "at the suggestion of the Securities and Exchange Commission", Standard's income apart from Mosler would have been $10,053,000. Even this figure included $426,000 in earnings which was admittedly earned in years prior to 1967. (R. 57, p. 760)

mailed to its stockholders its proxy statement recommending approval of the proposed merger of Air Brake into Standard. (Ex. 9) The proxy statement warned the stockholders against tendering their Air Brake shares to Crane under the Crane exchange offer (p. 2 of covering letter) and contained the following language:

> "Your Board of Directors believes that the merger with American-Standard *will benefit shareholders of WABCO by providing them,* on a favorable basis, *interests in new manufacturing and marketing fields in which WABCO is not presently engaged.* American-Standard is an international producer of building products, industrial and technical products, and bank, security and office systems. Upon the joinder of those businesses with WABCO operations, the resulting company will have an established position in the industrial world in the combined, broader based lines of business under competent management; will have available greater resources for expansion and research and will have more diversified sources of business and income." (Emphasis added.) (p. 1)

At page 37, the Air Brake proxy statement revealed that Crane had presented a proposal concerning a possible merger of Air Brake into Crane, that "a study was made by an independent consulting firm* to determine the feasibility of a merger of the two companies," and that "based upon such report, and upon other material available to it, the Board of Directors of the Corporation determined that the proposed merger was not in the best interests of the Corporation or its shareholders."

*The independent consulting firm was A. T. Kearney & Co. See page 5, *supra*.

On April 19, 1968, the scheduled expiration date of Crane's exchange offer to the Air Brake shareholders, Standard, acting in concert with Air Brake's management, artificially inflated the price of Air Brake stock on the New York Stock Exchange by a series of wash transactions in Air Brake stock.* The Court of Appeals for the Second Circuit subsequently held, in the decision below (419 F.2d 787), that these transactions were fraudulent manipulations in violation of Sections 9 and 10 of the 1934 Act and were done to deter tenders of Air Brake stock to Crane and to defeat Crane's exchange offer in order to prevent a Crane takeover of Air Brake and to implement the Air Brake/Standard merger. The Air Brake shareholders were not informed by either Air Brake or Standard of these transactions.

Prior to the Air Brake shareholders meeting of May 16, 1968, Crane instituted two actions to bar consummation of the Air Brake/Standard merger. The first was against Air Brake and its directors on the ground that Air Brake's proxy statement was false and misleading. The second was against Standard and Blyth & Co., Inc. ("Blyth"), its financial advisor, on the ground, among others, that Standard had manipulated the market in Air Brake stock on April 19th. On May 9, 1968, both actions were consolidated for all purposes. After trial the District Court on June 3, 1968 dismissed the entire complaint on the merits.

On June 7, 1968, Air Brake was merged into Standard. As a result, Crane's 32% common stock interest in Air Brake was converted into a 12% interest in Standard pre-

* The facts in this and the succeeding paragraph are taken from the opinion of the Court of Appeals.

ferred stock. On June 13, under an express threat of an antitrust action by Standard's chief executive officer, Crane sold for cash its 12% interest in Standard. The Court of Appeals later held that this sale was forced by Standard's fraudulent manipulation of Air Brake stock on April 19, which it found was in furtherance of Standard's "interest in defeating the Crane tender offer and consummating its own merger with Air Brake." (419 F.2d at 795).

On December 10, 1969, the Court of Appeals for the Second Circuit reversed in part and affirmed in part the judgment of the District Court dismissing Crane's complaint (419 F.2d 787). The dismissal of Crane's claim based on the Air Brake proxy statement was affirmed. The dismissal of Crane's claims based on the manipulation of Air Brake stock was reversed and the case was remanded to the District Court for a determination of Crane's remedies. On December 24, 1968, Standard petitioned the Circuit Court for a rehearing or for a hearing *en banc*. On March 4, 1970, the Circuit Court denied Standard's petition. The instant petition is directed to that part of the Circuit Court's judgment which affirmed the dismissal of Crane's claims based on the Air Brake proxy statement.

Reasons for Granting the Writ

The ruling below conflicts with the decision of this Court in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, decided January 20, 1970. In *Auto-Lite* this Court defined as "material" a fact that "might have been considered important by a reasonable shareholder who is in the process of deciding how to vote." 396 U.S. at 384. Under this standard both (i) the Air Brake directors' false representation as

to the reasons for their recommendation of the merger, and (ii) the non-disclosure of the manipulation of the market price of Air Brake stock on April 19 to defeat the Crane exchange offer were material.

The Court of Appeals applied a different standard of materiality; it defined a material fact as a fact "that would influence the stockholders to act differently if disclosed." 419 F.2d at 803. Applying this definition it held not material both the representation as to the directors' reasons for their merger recommendations, and the non-disclosure of the manipulation.

Holding corporate directors to the strictest duty of full disclosure in matters affecting the integrity or weight of their recommendations to stockholders concerning corporate mergers is of great practical and material significance given the phenomenal growth in recent years of the conglomerates through mergers and takeovers. The Court of Appeals held the Air Brake directors to a lesser duty of disclosure than required by the standard laid down by this Court forty days later in *Auto-Lite*.

We respectfully submit that a writ of certiorari should issue to the Court of Appeals for the Second Circuit vacating that part of the judgment of that court which affirmed the dismissal of the consolidated complaint and remanding the case to that court for further consideration in light of *Mills* v. *Electric Auto-Lite Co.*

(1) *The False Representations in the Air Brake Proxy Statement and Their Significance*

The Air Brake directors asserted in the proxy statement as a basis for their recommendation that the stockholders approve the merger, that the merger "will benefit stock-

holders of WABCO by providing them, on a favorable basis, interest in new manufacturing and marketing fields in which WABCO is not presently engaged." (Ex. 9, p. 3) Neither here or elsewhere in the proxy statement did Air Brake reveal the true basis upon which the directors' recommendation was premised. It did not reveal management's belief that Air Brake by itself had all of the resources necessary for increasingly profitable growth; that in management's judgment its interest was to remain independent and not merge with any other company, particularly one in the plumbing industry; that it had procured for use in communicating with Air Brake shareholders a report from an independent consultant, whom it regarded as reliable, that a merger of Air Brake into a company in the plumbing business would be adverse to the interest of the Air Brake shareholders because it would deprive them of the greater growth opportunities inherent in an independent Air Brake. On the contrary it represented that merger into Standard would be beneficial to the Air Brake shareholders by reason of the interest they would acquire in "new manufacturing fields", 75% of which were in the plumbing business. No disclosure was made that Standard's '67 earnings apart from Mosler (8% of sales) and a non-recurring extraordinary item declined for the fourth consecutive year.* And finally it did not reveal that the choice of Crane's principal competitor, the largest company in the plumbing business as a merger partner, was to prevent a Crane takeover and to force Crane out of the merged entity.

Directors are privy to inside information about the company's operations and its prospects not known to the public stockholder. The stockholders necessarily must assume

* See p. 6 *supra*.

that the directors' recommendation for a merger is premised on a reasonable basis and a full understanding and evaluation of all information, inside as well as outside. In making merger recommendations to their stockholders, directors are giving investment advice. The directors' recommendation will inevitably be accorded great weight by the stockholders. *Mills* v. *Electric Auto-Lite Co.*, 403 F.2d 429 (7th Cir. 1968), reversed on question of relief, 390 U.S. 375 (1970); *Norte & Co.* v. *Huffines*, CCH Fed. Sec. L. Rep. ¶ 92,204 (S.D.N.Y. 1968). Under these circumstances, the director must be held to the strictest duty of disclosure. They should be required to set forth, in Dean Shulman's imagery, not simply the "show window, but the entire store." Shulman, *Civil Liability and the Securities Act*, 43 Yale L.J. 227, 242 (1933). Here, the Air Brake directors did just the opposite. The show window, in terms of the purported "benefits" to Air Brake shareholders from a merger into Standard, was prominently displayed, but nothing was said about the rest of the store; that Air Brake's merger partner was picked not because of its viable growth prospects, but because, despite its poor growth prospects and declining earnings, it provided a means, not only of defeating the Crane takeover attempt, but of forcing Crane out of the merged entity. The failure to set forth these facts deprived the Air Brake stockholders of the data necessary to an informed evaluation of the directors' pro-merger recommendation, data essential to the making of an informed investment decision.

The proxy statement was materially misleading in another respect. It was never amended as required by Rule 14a-9(a) to inform the Air Brake stockholders that Standard, in concert with Air Brake, had on the scheduled expira-

tion date of the Crane exchange offer inflated the market price of Air Brake shares by selling 120,000 shares and purchasing on the market 170,000 shares of Air Brake stock at a net loss of over one-half million dollars in order to deter tenders of Air Brake shares under Crane's exchange offer. The materiality of these facts is self evident. Indeed, the Circuit Court held that "Standard's secret sales [120,000 shares] to IDS and Dillon Read and its purchasing tactics were facts to which a 'reasonable man would attach importance . . . in determining his choice of action in the transactions in question'," and should therefore have been disclosed under Rule 10b-5. But it did not hold that Rule 14a-9 was violated by the non-disclosure of these facts in the Air Brake proxy statement or an amendment thereto. The Court of Appeals applied different standards of materiality to Crane's 14a-9 claims than to its manipulation claims. A material fact under 14a-9 was one that "would influence the stockholder to act differently if disclosed." A material fact for the purposes of manipulation under 10b-5 was one "to which a reasonable man would attach importance . . . in determining his choice of action."

(2) *The Court of Appeals Decision Is in Conflict With a Later Decision of This Court*

There is a direct conflict between the decision of the Court of Appeals and the decision of this Court in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (January 20, 1970), decided forty days after the decision below. In *Auto-Lite* a merger had been approved at a shareholder's meeting following a proxy statement informing the Auto-Lite shareholders that their board of directors recommended approval of the merger but omitting to state that all of Auto-Lite's directors were under the domination and control of

the proposed merger partner. This Court held that it was no defense that the merger terms were in fact fair to the Auto-Lite stockholders, and stated:

> "Where the misstatement or omission in a proxy statement has been shown to be 'material,' as it was found to be here, the determination itself indubitably embodies a conclusion *that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote.*[6] This requirement that the defect have a significant *propensity* to affect the voting process is found in the express terms of Rule 14a-9, and it adequately serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so trivial, or so unrelated to the transaction for which approval is sought, that correction of the defect or imposition of liability would not further the interests protected by §14(a)."

"[6] Cf. List v. Fashion Park, Inc., 340 F.2d 457, 462 (C.A. 2d Cir. 1965); General Time Corp. v. Talley Industries, Inc. * * *." 396 U.S. at 384. (Emphasis added.)

Whether a misrepresentation "might have been considered important by a reasonable shareholder" is very different from whether a representation "would influence a stockholder's vote." "Influence" means to alter, sway, affect or induce. (Webster's Third New International Dictionary at 1160 (1967)). A material fact, as characterized by the Court of Appeals, is one that would affect the vote of the stockholder. However, this Court in *Auto-Lite* placed a much higher duty on a corporate board by requiring disclosure of all facts that *might have entered* into the hypothetical reasonable shareholder's deliberations as an important factor.

(3) *A Writ of Certiorari Should Issue Vacating Part of the Court of Appeals' Judgment and Remanding the Case for Consideration in View of Auto-Lite*

The great increase in corporate takeovers in recent years is a phenomena of major economic and social consequence in the country. FTC, *Current Trends in Merger Activity* (Stat. Rpt. No. 6 1970); *Hearings on Mergers & Acquisition Before a Subcomm. of the House Comm. on the Judiciary* (Testimony of SEC Chairman Budge 5/14/70); FTC, *Economic Report on Corporate Mergers* pt. 8a (1969).* Directors' recommendations to their stockholders as to how to vote are of critical and often decisive importance in corporate takeover contests. There must be no confusion or uncertainty as to the scope of a director's duty to disclose the basis of and the considerations pertinent to his recommendations in such contests.

The confusion as to the standard of materiality is noted in *Tender Offers; The Target Company's Duty of Disclosure* (Krasik, 25 Bus. Lawyer No. 2, January 1970, p. 455, fn. 24 at p. 459). That this confusion persists, despite this Court's decision in *Auto-Lite*, is illustrated by the recent decision in *Abramson* v. *Nytronics, Inc.*, CCH Fed. Sec. L. Rep. ¶92,637 (S.D.N.Y. 4/3/70), where the court defines material facts as of "such nature that they could

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* In requesting a study by the FTC, Senator Phillip A. Hart, Chairman of the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee, stated that "[d]uring its hearings on economic concentration the subcommittee has received sufficient evidence to cast a cloud over the long-run viability of many present day mergers." Letter to FTC Chairman Dixon (5/17/68). The necessity of careful shareholder consideration, with full knowledge of all the facts bearing on the desirability of a proposed merger is apparent.

normally be expected to lead a reasonable stockholder not to vote in favor of the proposal set forth in the material." (¶92,637 at 98,842) This standard imposes a greater duty of disclosure than required by the "would influence" standard applied below, but a lesser duty of disclosure than required by this Court's decision in *Auto-Lite*.

A director, in making recommendations concerning mergers to his stockholders, must be held to the highest and strictest duty to disclose the basis upon which his recommendations in fact rest. Here, the Circuit Court applied a lesser duty of disclosure on directors under 14a-9 than it did under 10b-5. If there is to be a distinction between the duty to disclose under sections 10 and 14 of the Act, certainly the fiduciary duty which directors owe to shareholders mandates a more encompassing duty in proxy solicitation cases. Moreover, both formulations set out by the Court of Appeals in this case imposed a lesser duty of disclosure than that required by this Court's later decision in *Auto-Lite*, for neither require disclosure of a fact that *might* reasonably be considered important.

Accordingly, we respectfully submit that a writ should issue to the Court of Appeals vacating that part of its judgment which affirmed the dismissal of the consolidated complaint and remanding the case for consideration, in light of *Auto-Lite*, of its dismissal of Crane's 14a-9 claims based on (1) the false representations as to the reasons for the merger and (2) the non-disclosure of the manipulation. This action is necessary despite the Court of Appeals having sustained Crane's claim under sections 9 and 10 of the Act for manipulation of the price of Air Brake stock and having remanded the manipulation claim to the District Court for a determination of Crane's remedies arising out of the manipulation. A material misrep-

representation in the Air Brake proxy statement, an "essential link in the accomplishment of" the merger, would increase the probability of divestiture or separation of Air Brake since there would be no need for proof that the manipulation deprived Crane of success in its tender offer.

CONCLUSION

That part of the Court of Appeals' decision which rejects Crane's claims arising out of the Air Brake solicitation of proxies for the merger is in conflict with the later decision of this Court in *Mills* v. *Electric Auto-Lite Co.* in that the Circuit Court imposed a lesser requirement of disclosure on directors recommending the merger than is required by the *Auto-Lite* decision. For the foregoing reasons, a petition for a writ of certiorari should issue vacating that part of the judgment below which affirmed the dismissal of Crane's consolidated complaint and remanding the case to the Court of Appeals for further consideration in light of *Mills* v. *Electric Auto-Lite Co.*

Respectfully submitted,

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APPENDIX A

Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 435, 436, 437, 438—September Term, 1968.
(Argued March 7, 1969 Decided December 10, 1969.)
Docket Nos. 32569, 32570, 32571, 32572

CRANE COMPANY,

Plaintiff-Appellant,

—v.—

WESTINGHOUSE AIR BRAKE COMPANY, A. KING MCCORD, EDWARD J. JANLEY, EDWIN HODGE, JR., FRANK L. MAGEE, JOHN A. MAYER, G. ALBERT SHOWMAKER, ERIC A. WALKER, LAWRENCE E. WALKLEY, JAY V. WILCOX and LESLIE B. WORTHINGTON,

Defendants-Appellees.

CRANE COMPANY,

Plaintiff-Appellant,

—v.—

AMERICAN STANDARD, INC. and BLYTH & CO.,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*
SMITH and KAUFMAN, *Circuit Judges.*

* * * * *

SMITH, *Circuit Judge*:

This is an appeal by Crane Company from a decision of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*, entered June 5, 1968, dismissing, after trial on the merits, Crane's consolidated complaint which was brought to prevent the consummation of the proposed merger of Westinghouse Air Brake Company ("Air Brake") into American Standard, Inc. ("Standard"). We find error in part and reverse and remand for further proceedings consistent with this opinion.

In the first action of the two later consolidated, Crane sought to enjoin appellees from giving effect to proxies solicited by Air Brake from its shareholders in support of a proposed merger of Air Brake into Standard. The suit was founded on claimed misrepresentation of Standard's earnings, and on allegedly false and misleading statements of other facts in violation of sections 10[1] and 14[2] of the Securities Exchange Act of 1934 and Rules 14a-9[3] and 10b-5.[4]

Crane's second action, which was consolidated with the first action for all purposes, was instituted against Standard and Blyth & Company, Inc. ("Blyth") under sections 9,[5] 10 and 14 of the Exchange Act and Rules 10b-6[6] and 10b-5 and Regulation 14A,[7] the proxy rules, alleging that Blyth on Standard's behalf manipulated and rigged the price of Air Brake stock on the New York Stock Exchange at the expense of the merged entity for the purpose of deterring tenders of Air Brake stock under a Crane exchange offer.

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[1] 15 U.S.C. §78j.
[2] 15 U.S.C. §78n.
[3] 17 C.F.R. §240.14a-9.
[4] 17 C.F.R. §240.10b-5.
[5] 15 U.S.C. §78i.
[6] 17 C.F.R. §240.10b-6.
[7] 17 C.F.R. §240.14a-1 et seq.

The Factual Background

Crane first proposed a merger of Crane and Air Brake to the Air Brake management on May 15, 1967. Crane thereafter first began substantial purchases of Air Brake stock on June 15, 1967. This was noticed by Air Brake's management.

On September 27, 1967, Air Brake received from A. T. Kearney & Company, Inc., independent management consultants, a report which concluded that there was no material compatibility of products between the Air Brake and Crane product lines. On November 3, 1967, Air Brake informed Crane that it did not wish to pursue any merger discussion with Crane.

By that time a beneficial owner of nearly 10 percent of Air Brake's outstanding stock, Crane embarked on a systematic program of purchasing Air Brake shares, despite the November 3 rebuff. Air Brake's management, desiring to prevent Crane from obtaining representation on Air Brake's board of directors, on December 7, 1967, changed the Air Brake by-laws to increase the minimum cumulative vote necessary to obtain representation on the board from 9.1 percent to 25 percent.

In mid-December, 1967, Air Brake requested Kearney & Company to analyze Crane's performance. Shortly thereafter, Mr. Devlin, chairman of Blyth & Company, investment bankers and representative of Standard, proposed to A. King McCord, chairman of Air Brake, that Standard would be interested in helping Air Brake resist the Crane take-over attempt. The Kearney report of January 15, 1968, analyzed the profits of both Crane and its largest competitor, Standard, and concluded that the trend of their earnings and profits was similar, and that the plumbing industry was less dynamic than the industry participated in by Air Brake.

On February 20, 1968, Crane filed its 14-B statements with the SEC declaring its intention to solicit proxies to elect directors to the Air Brake board. Air Brake immediately learned of this. On the same day McCord met with several of the Air Brake directors, and discussed the February 19 proposal of Blyth & Company to merge Air Brake into Standard by exchanging Air Brake stock for a Standard security worth approximately $50 per share. Air Brake's stock was then quoted at about $36 per share.

On March 4, 1968, seven of the ten Air Brake directors met in special session and agreed on the merger of Air Brake into Standard, substantially on the terms which McCord had reached in negotiations with representatives of Standard on March 1, 1968. On March 5 Air Brake informed its shareholders of the terms of the agreement and its approval thereof. Air Brake stock rose to $44 on the New York Stock Exchange.

During the week of April 8, 1968, Crane mailed to Air Brake stockholders its offer to exchange Crane stock and debentures totalling $50 in face amount for each share of Air Brake stock, the offer to expire on April 19 at 5:00 p.m., unless extended. During the same week, Air Brake mailed its proxy statement dated April 8 soliciting proxies in favor of the proposed Standard merger. On April 10, Air Brake stock was selling at about $49. During this week, Standard's purchases of Air Brake shares were substantial. On April 19, the day Crane's tender offer was to expire, Standard purchased 170,000 shares of Air Brake on the New York Stock Exchange at an average cost of $49.50 per share, and sold 100,000 shares off the market to Investors Diversified Services ("IDS") and 20,000 shares on the market at a negotiated price to Dillon Read at an average price of $44.50 per share, taking an apparent loss of more than $500,000 on its purchases and sales for the day.

Crane continued to accumulate Air Brake stock. By mid-April, Crane held about 15 percent of Air Brake's stock, 25 percent by the time of trial, and had increased its holdings to about 32 percent by the end of May, 1968.

The special meeting of Air Brake stockholders was convened on May 16, 1968. The proxy count ran heavily in favor of the Air Brake-Standard merger, 2,903,869 to 1,180,298, very few shares of Air Brake not owned by Crane itself being voted against the merger.

The trial in the District Court began on May 21, 1968, and continued for two weeks until June 3. Judge Ryan read his opinion into the record, and the court entered judgment dismissing the consolidated complaint on the merits on June 5, 1968. The merger became effective on June 7, 1968, upon which the former Air Brake stock was converted into shares of a new issue of Standard convertible preferred. Crane's 32 percent stock interest was converted into 740,311 shares of this preferred stock. On June 13, 1968, under threat of a divestiture action to be brought by Standard under the antitrust laws, Crane sold all but 10,000 of its shares of Standard, at a profit of several million dollars, and later disposed of all but 1,000 of the remaining shares.

Standard's Stock Transactions

Crane attacked Standard's transactions in Air Brake stock on two grounds, one as illegal purchases of votes or proxies, the other as market manipulation and fraud in connection with the purchase and sale of securities. The first attack was pressed most vigorously below but was properly disposed of as unsupported in the evidence and is no longer pressed here.

Perhaps because of the pressure of circumstances and the heavy emphasis on the vote buying claim, the court denied relief with no extensive treatment of the market manipulation and fraud claims involving sections 9(a)(2) and 10(b) of the Act. Consideration of these claims in the light of undisputed evidence in the case leads us to a result contrary to that reached by the District Court.

Market Manipulation and Deception

While the main thrust of Crane's case below was in support of the claims of deceptive proxy statement and illegal vote buying, it also vigorously attacked Standard's market activities as forbidden manipulation and fraud in connection with the purchase and sale of securities. The record plainly supports this claim that Standard violated sections 9(a)(2) and 10(b) of the Exchange Act.

In the District Court, Crane maintained that Standard had been buying or selling Air Brake stock conditioned upon the granting or reservation of voting rights. The court found this claim unsupported.[8] Although Crane also alleged that Standard manipulated and inflated the market price of Air Brake with a view to frustrating the Crane tender offer, the District Court summarily rejected this claim.[9]

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8 "I find there is no proof that American Standard has been buying or selling Air Brake stock conditioned upon the granting or reservation of voting rights. The fact that American Standard bought shares of Air Brake in order to vote in favor of the merger and that it sold to persons whom it hoped would vote in favor of the merger either to obtain money to purchase stock or to keep its holdings below a 10 percent control interest does not constitute a purchase of votes independent of the stock to which the votes belong."

9 "In the same way, assuming American Standard, through Blyth & Company, was actively engaged in acquiring Air Brake stock solely, as I have noted, in order to vote it in favor of the merger, I find nothing illegal about it. This was the very thing that plaintiff Crane was lawfully doing when it made its tender in order to oppose the merger."

The facts surrounding the manipulation of Air Brake stock by Standard are substantially free from dispute. The critical day in the take-over battle was April 19, the day Crane's tender offer for Air Brake stock was to expire. The holders of Air Brake stock could be expected to delay until the last moment in order to make a decision based on the latest market information, i.e., to compare the value of the tender offer, here not more than $50, with the market price on the day the offer was to expire. In fact, 85 percent of the shares tendered to Crane by the 19th were offered on that day. See Schmultz and Kelley, *Cash Take-Over Bids—Defense Tactics*, 23 Bus. Lawyer 115, 124 (1967). On April 19, Air Brake opened at 45¼ on the New York Stock Exchange, giving Crane's tender offer a good prospect of success. The surest way to defeat the Crane offer was to run the price up to $50. The tape did quickly reach $50 on April 19, and Crane's tender offer failed. Crane's claim that this was the result of extraordinary transactions by Standard is supported by the record.

At the close of trading on the 18th, Standard's net accumulation of Air Brake totalled 367,000 shares. Standard had a self-imposed limit of 460,000 shares, or 10 percent of Air Brake's outstanding stock, allegedly to avoid problems of pooling-of-interest accounting treatment and liability under section 16(b) of the Exchange Act. Only 92,600 shares remained to be purchased to reach Standard's self-imposed limit. On Friday, the 19th, Standard proceeded to purchase in a series of transactions, ranging in size from 100 to 9700 shares, a total of 170,200 Air Brake shares, at an average price of $49.08 per share, and a total price of approximately $8.4 million. The net result of this buying was to represent to the public, whose primary source of information is the tape, that there was a great demand

for Air Brake at an increased value. It is reasonable to conclude that many Air Brake stockholders who might otherwise have chosen to tender to Crane chose not to do so because their own holdings in Air Brake looked better as the price went up.

The fact was, however, that not only was Standard creating this extraordinary demand for Air Brake stock, but only 50,000 of the 170,000 shares represented an actual increase in Standard's holding in Air Brake. Before the opening of the market on Friday, Mr. Ledbetter of IDS agreed to purchase from Standard 100,000 shares of Air Brake at $44½. This transaction did not affect the dramatic 5 point climb of the "tape" price of Air Brake since Standard made no public announcement of the private sale. The sale to IDS was secret; Standard's telegram to IDS confirming the sale was marked "HIGHLY CONFIDENTIAL." Shortly after the opening Standard sold another 20,000 Air Brake shares to Dillon Read at 44⅞, at the same time that it was buying on the exchange. At the close of trading on Friday the 19th, Standard held a total of 417,000 Air Brake shares. It had sold 120,000 shares at a price of just above $44½, and purchased 170,000 shares at an average price of $49.08, for a net trading loss exceeding one-half million dollars. Standard had "painted the tape" in Air Brake stock. It appears that of the 26,300 shares of Air Brake traded at 50 that day, all but 100 were bought by Standard. This course of conduct was certain to raise the price of Air Brake stock suddenly and dramatically.

Standard's extraordinary buying here, coupled with its large secret sales off the market, inevitably distorted the market picture and deceived public investors, particularly the Air Brake shareholders. The effect of these purchases was to create the appearance of an extraordinary demand

for Air Brake stock and a dramatic rise in market price, as a result of which Air Brake shareholders were deterred from tendering to Crane. Concentrated open market bidding in a take-over battle may not in itself violate present laws and regulations, a question we do not decide here. Standard's action here, however, in concealing from the public—and in particular from the Air Brake stockholders—the true situation as to the market it was making in Air Brake stock resulted in violations of sections 9(a)(2) and 10(b) of the Act.

The entire corporate take-over problem, mushrooming in recent years, is properly engaging the attention of the Congress and the Commission. See Schmultz and Kelley, *op. cit. supra* at 115 n. 2. See also Public Law 90-439, §3, 82 Stat. 455 (1968). In the meantime, we must apply to the devices, new and old, used in these battles the protections contained in legislation existing at the dates of the actions in suit.

We must determine the application of sections 9(a)(2) and 10(b) to the relatively new device of the tender offer, rarely used before 1965, and to the methods here used to combat it. See Hayes and Taussig, *Tactics of Cash Take Over Bids*, 45 Harv. Bus. Rev. No. 2 135 (March-April 1967). Manipulative schemes may not be allowed to succeed solely because they are novel. *A. T. Brod & Co. v. Perlow*, 375 F.2d 393 (2d Cir. 1967). The Act was designed "[t]o provide for the regulation of securities exchanges and of over the counter markets . . . [and] to prevent inequitable and unfair practices on such exchanges and markets. . . ." 48 Stat. 881; see 15 U.S.C. §78b. As this court emphasized in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 858, 860 (2d Cir. 1968), *cert. denied sub nom. Coates* v. *SEC*, 394 U.S. 976 (1969), the purpose of the Act

was to "protect the investing public," to "promote free and open public securities markets" and to "secure fair dealing in the securities markets." These statutory objectives require the granting of relief in this case.

Section 9(a)(2), 15 U.S.C. §78i(a)(2) makes it unlawful:

> To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

Liability for a violation of section 9(a)(2) is provided by section 9(e):

> Any person who wilfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction.

Section 9(a)(2) was considered to be "the very heart of the act" and its purpose was to outlaw every device "used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage." 3 Loss, Securities Regulation 1549-50 (2d ed. 1961).

Sections 9(a)(2) and 9(e) contain requirements of both manipulative motive and willfulness. The section does not condemn extensive buying or buying which raises the price of a security in itself. Nor are the requirements of manipulative purpose and willfulness to be interpreted apart from

the statute's design to prevent those with a financial interest in a security from manipulating the market therein. The requisite purpose and willfulness is normally inferred from the circumstances of the case. *In the Matter of Halsey, Stuart & Co.*, 30 SEC 106, 123-24 (1949); cf. *United States* v. *Minuse*, 114 F.2d 36 (2d Cir. 1940).

It is clear that Crane was one of the class of persons intended to be protected by the statute against Standard's violation. Standard acted for the "purpose of inducing" sale by Crane. Standard's actions had the intended and inevitable effect of inducing Crane to become a seller within the meaning of section 9(a)(2), for if successful in defeating Crane's tender offer and consummating the Standard merger, antitrust considerations would require sale by Crane of the shares held by Crane or those received in exchange. This placed Crane in a situation comparative to that of the dissenting shareholders in *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2d Cir. 1967), *cert. denied* 389 U.S. 970 (1968) for here, as there, plaintiff was forced to become "a seller under the Act."

Section 9(a)(2) was aimed at preventing an individual from dominating the market in a stock for the purpose of conducting a one-sided market at an artificial level for its own benefit and to the detriment of the investing public. See Note, *Manipulation of the Stock Markets Under the Securities Laws*, 99 U. Pa. L. Rev. 651 (1951); Note, *Regulation of Stock Market Manipulation*, 56 Yale L.J. 509 (1947). See also the House Report on the Exchange Act:

> To insure to the multitude of investors the maintenance of fair and honest markets, manipulative practices of all kinds on national exchanges are banned. The bill seeks to give to investors markets where prices may be established by the free and honest balancing of in-

> vestment demand with investment supply. . . . [T]he most subtle manipulating device employed in the security markets . . . is the conscious marking up of prices to make investors believe that there is a constantly increasing demand for stocks at higher prices. . . . Legitimate investors desire to buy at as low a price as possible and to sell at as high a price as possible, and honest markets are made by the balancing of investment demand and investment supply.

H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934) at 11.

When a person who has a "substantial, direct pecuniary interest in the success of a proposed offering takes active steps to effect a rise in the market" in the security, we think that a finding of manipulative purpose is prima facie established.[10] Here we have even more than a motive to manipulate joined with the requisite series of transactions. In furtherance of its interest in defeating the Crane tender offer and consummating its own merger with Air Brake, Standard took affirmative steps to conceal from the public its own secret sales off the market at the same time it was dominating trading in Air Brake shares at a price level calculated to deter Air Brake shareholders from tendering to Crane.

Standard's argument that it had only the purpose to acquire shares of Air Brake looking toward control and not to manipulate is unconvincing. Standard's massive buying on April 19, coupled with its concealed sales, was not consistent with the normal desire of an investor "to buy at as low a price as possible." H.R. Rep. No. 1383, *supra*, at 11. Neither Crane nor Standard were normal

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10 3 Loss, Securities Regulation 1552-53 (2d ed. 1961); *Federal Corp.*, 25 SEC 227, 230 (1947); see *SEC* v. *Torr*, 22 F. Supp. 602 (S.D.N.Y. 1938).

investors. Standard knew that it could not acquire 120,000 shares of Air Brake on one day's trading for immediate delivery without paying a substantial premium for the stock. In the week prior to April 10, Standard had in fact purchased 16,500 shares at an average price of $43.38 per share. Knowing that running up the price of Air Brake stock on April 19 would discourage acceptance of the Crane offer, Standard's extraordinary purchases and simultaneous sales on April 19 cannot be explained solely by an alleged "purpose" to acquire voting control consistent with the scope and design of section 9(a)(2). Cf. *White & Weld*, 3 SEC 466, 505 (1938).

An ordinary investor watching the tape could only conclude that there was a wide-based demand for Air Brake stock and that it would be unprofitable to tender his stock to Crane at that time. See *SEC* v. *Torr, supra* n. 10; *Halsey, Stuart & Co., supra.* Not only did Standard fail to provide Air Brake shareholders with the information that it planned or was in fact purchasing large amounts of Air Brake stock at a price which made the Crane offer look unappealing on the crucial expiration date, but it further distorted their only ready source of market information—the stock tape—by secret private sales off the stock exchange. As Judge Ryan himself put it, "The securities laws are concerned with the facts presented to the stockholders, not with the motives underlying these facts." See *Heit* v. *Weitzen*, 402 F.2d 909, 913 (2d Cir. 1968), *cert. denied* 395 U.S. 903 (1969); *SEC* v. *Texas Gulf Sulphur Co., supra*, at 401 F.2d 861.

From the foregoing, it is also clear that Standard has violated section 10(b) of the Exchange Act, and Rule 10b-5, 17 C.F.R. 240.10b-5, pursuant to section 10(b) of the Exchange Act, provides as follows:

> It shall be unlawful for any person, . . . by use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made not misleading, or
>
> (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Standard's failure to disclose its manipulation operated as a fraud or deceit on Crane in connection with the purchase and sale of securities, creating a right to relief in Crane quite apart from Crane's rights as a forced seller under section 9(a)(2).

The nondisclosure rule is based "in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information. . . . The essence of the Rule is that anyone who, trading for his own account in the securities of a corporation has 'access, directly or indirectly, to information intended to be available only for a corporate purpose . . .' may not take 'advantage of such information knowing it is unavailable to those with whom he is dealing,' i.e., the investing public." *SEC* v. *Texas Gulf Sulphur Co.*, *supra*, at 401 F.2d 848 (citations omitted).

Standard was an "insider" with respect to the trading of Air Brake stock. Standard was acting in concert with the Air Brake management, with whom it was on the verge of consummating a merger. Standard regularly and systematically informed the Air Brake management of its transactions in Air Brake's stock. Finally, Standard was a major stockholder of Air Brake, and its purchases were within its peculiar knowledge and were an integral part of the take-over scheme.

When securities are subject to trading dominated by an insider such as Standard, there is an obligation to disclose material information to the investing public, and this duty gives rise to liability under 10b-5 to third persons who, as a result of the deception practiced upon the public, are prevented from entering into securities transactions with members of the public. When Crane entered the securities market with its tender offer, it was entitled to the Act's protection not only against being deceived itself but also against deception of the investing public designed to prevent the public from entering into securities transactions. See *SEC* v. *Texas Gulf Sulphur Co.*, 258 F. Supp. 262, 279 (S.D.N.Y. 1966) and *supra*, at 401 F.2d 848.

The inherent unfairness and deception practiced by Standard is readily apparent. The proxy regulations do not protect the investing public against all types of manipulative devices. Although information concerning the terms and purposes of the tender offer are provided by the offeror, the "investors' primary yardstick for evaluating the offer is the market performance, past and present, of the security he holds and the one he is offered, if any." Bromberg, Securities Laws: Fraud—SEC Rule 10b-5 §6.1, p. 111 (1969). In the present case, the market information itself was misleading. If Air Brake's stockholders were

aware of Standard's plans and actions on April 19, they would have been able to place the trading in perspective and would not have been misled by the superheated trading of Air Brake on the New York Stock Exchange. Standard's extraordinary buying on April 19, coupled with its large secret sales off the market distorted the market picture and deceived the Air Brake stockholders.[11] From the foregoing it is also clear that the undisclosed information was material. Standard's secret sales to IDS and Dillon Read and its purchasing tactics were facts to which a "reasonable man would attach importance . . . in determining his choice of action in the transactions in question." *List* v. *Fashion Park, Inc.*, 340 F.2d 457, 462 (2d Cir. 1965), *cert. denied* 382 U.S. 811 (1965); *SEC* v. *Texas Gulf Sulphur Co., supra*, at 401 F.2d 849-52.

Since the violation in this aspect is not manipulation but failure to disclose the trading scheme, the question arises as to whether Crane is a proper party to raise the issue since it did not rely on the nondisclosure. Although we have held that reliance was necessary under 10b-5, *List* v. *Fashion Park, Inc., supra*, at 340 F.2d 463, reliance is an element of causation which plays little role in nondisclosure cases. As we pointed out in *List*, "the test of 'reliance' is whether 'the misrepresentation is a substantial factor in determining the course of conduct which results in [the plaintiff's] loss.' . . . The reason for this requirement . . . is to certify that the conduct of the defendant actually

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11 This is not necessarily a double violation of 10b-5—i.e., once in the manipulation and again in its nondisclosure. Standard's transactions were manipulative, and it concealed material information, the violation of 10b-5 consisting of nondisclosure of the manipulation. Compare *Thornton & Co.*, 28 SEC 208, 224 (1948), *aff'd sub nom. Thornton* v. *SEC*, 171 F.2d 702 (2d Cir. 1948); *Adams & Co.*, 33 SEC 444 (1952); *Surowitz* v. *Hilton Hotels*, 342 F.2d 596 (7 Cir. 1965), *rev'd and remanded* 383 U.S. 363 (1966).

caused the plaintiff's injury," since a "basic . . . element of tort law" is "the principle of causation in fact." 340 F.2d at 462, 463. We have held that where the success of a fraud does not require an exercise of violation by the plaintiff, but instead requires an exercise of violation by other persons, there need be no showing that the plaintiff himself relied upon the deception. "What must be shown is that there was deception which misled [other] stockholders and that this was in fact the cause of plaintiff's claimed injury." *Vine* v. *Beneficial Finance Co., supra,* at 635. Standard's deception caused injury to Crane. Crane's tender offer could only be successful if its value to investors was attractive in comparison with the indicated value of Air Brake on the New York Stock Exchange. The extent of the damage will have to be determined by the District Court, in fashioning an appropriate remedy, and the burden of proof thereon will be on Crane. It is sufficient that the causation requirement is satisfied here to the extent of imposing liability upon Standard for the consequences of concealing from the public material information relevant to the market value of Air Brake stock in a free market.

The standing issue arises in another context with respect to the purchaser-seller limitation, which arises from the language of both section 9(a)(2) and Rule 10b-5. Section 9(a)(2) prohibits manipulation "for the purpose of inducing the purchase or sale of such security by others," while Rule 10b-5 similarly prohibits deception upon "any person in connection with the purchase or sale of any security."

Although this court adhered to a fairly strict construction of the purchaser-seller requirement in *Birnbaum* v. *Newport Steel Corp.,* 193 F.2d 461 (2d Cir.), *cert. denied* 343 U.S. 956 (1952), and in *Iroquois Industries* v. *Syracuse China Corp.,* —— F.2d —— (2d Cir. Nov. 3, 1969), there

was in *Birnbaum* no indication of a causal connection between the alleged violation of Rule 10b-5 and the injury to the corporation and its shareholders. The requirement has been interpreted fairly broadly in cases since *Birnbaum*. In *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F.2d 540 (2d Cir. 1967), we held that shareholders of a corporation had standing under Rule 10b-5 to obtain injunctive relief to prevent controlling persons from depressing the price of the corporation's stock by market manipulation, even though the complaining shareholders had purchased their shares prior to the manipulation and had not yet sold them. The damage claim was dismissed for lack of a causal connection, *id.* at 547. See *General Time Corp.* v. *Talley Industries, Inc.*, 403 F.2d 159 (2d Cir. 1968), *cert. denied* 393 U.S. 1026 (1969); *SEC* v. *General Time Corp.*, —— F.2d —— (2d Cir., Nov. 19, 1968) (slip op. p. 347), *cert. denied* 393 U.S. 1026 (1969). In damage actions, this court in *Symington Wayne Corp.* v. *Dresser Industries*, 383 F.2d 840, 842 (2d Cir. 1967), referred to the decisions in *A. T. Brod & Co.* v. *Perlow, supra*, and *Vine* v. *Beneficial Finance Co., supra*, as having "expressly left undecided the question whether one who is neither a purchaser nor a seller can attack a transaction under Rule 10b-5." [12] *Iroquois* declined to allow relief in a tender offer situation where plaintiff was neither a purchaser nor a seller.

The present case falls within the rationale of *Vine*, where we held that a minority shareholder in a short form merger is a "seller" since he is entitled only to cash for his shares. See also *Dasho* v. *Susquehanna*, 380 F.2d 262 (7 Cir.), *cert.*

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12 See *Opper* v. *Hancock Securities Corp.*, 367 F.2d 157 (2d Cir. 1967), *aff'g* 250 F. Supp. 668 (S.D.N.Y. 1966); *Commerce Reporting Co.* v. *Puretec, Inc.*, 290 F. Supp. 715 (S.D.N.Y. 1968); *Stockwell* v. *Reynolds & Co.*, 252 F. Supp. 215 (S.D.N.Y. 1965); *Voege* v. *American Sumatra Tobacco Corp.*, 241 F. Supp. 369 (D. Del. 1965).

denied 389 U.S. 977 (1967). The effect of Standard's deception and manipulation was to deter Air Brake shareholders from tendering to Crane. The success of Standard's maneuver made Crane a forced seller of the newly issued Standard convertible preferred under threat of a divestiture action to be brought by Standard under the antitrust laws.[13] Thus, we have here in Crane one induced to sell by Standard's deception and manipulation and so within the protection of section 9(a)(2). Moreover, even if a narrower view were taken of section 9(a)(2), it would seem that Standard's conduct would still be actionable under Rule 10b-5(c), condemning conduct which operates as a fraud or deceit "upon any person."

The purchase-sale requirement must be interpreted so that the broad design of the Exchange Act, to prevent inequitable and unfair practices on securities exchanges and over-the-counter markets, is not frustrated by the use of novel or atypical transactions. *A. T. Brod & Co.* v. *Perlow, supra,* 375 F.2d at 397. "In determining who has standing to enforce duties created by statute, a court's quest must be for what will best accomplish the purposes of the legislature." *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 946 (2d Cir. 1969). The purpose of Congress in enacting sections 9(a)(2) and 10(b) was to protect the investing public from manipulation and deception by the use of devices which defrauded or misled investors in securities transactions.[14]

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13 The same might be said of the Air Brake stockholders who, after the merger were faced with the cancellation of Air Brake common stock, and whose alternatives were to exchange their Air Brake shares for the new preferred, or to enforce their appraisal rights as dissenting shareholders.

14 Congress when it used the phrase "in connection with the purchase or sale of any security" intended only that the device employed, whatever

We find violation of both section 9(a)(2) and Rule 10b-5 and standing in Crane to raise the issue. The amendment to the Act adding section 14(e) (15 U.S.C. §78n(e))[15] effective July 29, 1968, subsequent to the events here in question, should serve to resolve any doubts about standing in the tender offer cases, even where an offeror is not, as is Crane, in the position of a forced seller.

THE AIR BRAKE PROXY STATEMENT

We turn now to the Air Brake proxy statement. Crane's principal contention is that the proxy statement misrepresents Standard's 1967 operating earnings and net income.

Rule 14a-9 of the Securities and Exchange Commission, 17 C.F.R. §240.14a-9, provides that no proxy solicitation shall be made which under all the circumstances "is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading. . . .". Viola-

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it might be, be of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities.

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Therefore, when materially misleading corporate statements or deceptive insider activities have been uncovered, the courts, as they should, have broadly construed the statutory phrase "in connection with the purchase or sale of any security." *SEC* v. *Texas Gulf Sulphur Co.*, *supra*, 401 F.2d at 860-61. See *Heit* v. *Weitzen*, *supra*, 402 F.2d at 913 (2d Cir. 1968).

15 15 U.S.C. §78n(e) provides:

"It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation."

tions of the proxy rules give rise to a private right of action under section 27. *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). Also applicable here is Rule 10b-5, which encompasses a similar concept of fraud. *SEC* v. *National Securities*, 393 U.S. 453, 466-469, 89 S. Ct. 564, 573 (1969). We do not separately discuss the scope of Rule 10b-5's general impact on fraud and material omission in proxy statements in view of our holding here that there was no violation of the detailed proxy rules.[16]

For liability to attach under Rule 14a-9 there must be a false or misleading statement, and it must be material.[17] Rule 3-02 of Regulation S-X. The representation must be one that would influence the stockholder's vote.[18] See JENNINGS & MARSH, SECURITIES REGULATION 964-1003 (2d ed. 1968); 2 LOSS, SECURITIES REGULATION 917-18 (2d ed. 1961); Soward & Mofsky, *Federal Proxy Regulation: Recent Extensions of Control*, 41 St. John's L. Rev. 165 (1966). To the extent that the District Court rejected Crane's allegations as a matter of fact, the issue on appeal is whether on the record as a whole these findings are clearly erroneous. Fed. R. Civ. P. 52(a); *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364 (1948); cf. *Comstock* v. *Group of Investors*, 163 F.2d 350, 357 (8 Cir. 1947), *aff'd* 335 U.S. 211 (1948).

Crane asserts that Standard's foreign results were incorrectly presented by the statement in the proxy: "Foreign

16 See *Miller* v. *Steinbach*, 268 F. Supp. 255, 278-79 (S.D.N.Y. 1967); *Simon* v. *New Haven Board & Carton Co.*, 250 F. Supp. 297 (D. Conn. 1966); *Barnett* v. *Anaconda Co.*, 238 F. Supp. 766, 776 (S.D.N.Y. 1965).

17 *Richland* v. *Crandall*, 262 F. Supp. 538 (S.D.N.Y. 1967).

18 *Miller* v. *Steinbach*, *supra* n. 16; *Dunn* v. *Decca Records, Inc.*, 120 F. Supp. 1 (S.D.N.Y. 1954); *Kaiser-Frazer Corp.* v. *Otis & Co.*, 195 F.2d 838 (2d Cir. 1952), *cert. denied* 344 U.S. 856 (1952) (material exaggeration of earnings trend).

results improved in 1967, after a two-year decline." The proxy statement indicates that foreign results improved by $857,000 over 1966. Crane does not dispute that there was some improvement in Standard's foreign results. It contends, however, that $726,000 of this improvement resulted from the inclusion, for the first time, in the 1967 consolidated statement of the operations of the Brazilian subsidiary, $426,000 of which are attributable to the earnings of that subsidiary prior to 1967. Although Rule 4.04(b) of Regulation S-X requires specific mention of the inclusion in a consolidated statement of the earnings of a subsidiary not similarly included in the previous statement,[19] the rule is not dispositive here. Standard had consistently followed the practice of consolidating all foreign subsidiaries in a comparable status to the Brazilian subsidiary in 1967, and there was a determination by independent public accountants that the Brazilian subsidiary's operations were not of such materiality in the overall consolidated results of operations, over $13,350,000 net income, as to warrant specific mention. The District Court found that the method used by Standard was according to generally accepted accounting procedures and presented a true financial picture. This finding is a recognition of the fact that full disclosure does not require the inclusion in a proxy statement of every relevant detail of a company's operation. While mention in the statement would have pointed out the true situation more accurately, we recognize that the requirement of materiality is a matter to be determined upon all of the

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19 "4.04(b) As to each consolidated statement and as to each group statement of unconsolidated subsidiaries, a statement shall be made as to whether there have been included or excluded any persons not similarly treated in the corresponding statement for the preceding fiscal period filed with the Commission. If the answer to the foregoing is in the affirmative, the names of such persons shall be given.

relevant facts and circumstances, *Richland* v. *Crandall*, *supra* n. 17, Rule 3-02 of Regulation S-X,[20] and we find no error in the court's finding that the accountant's treatment was proper here.

Crane also challenges the following statement in the proxy relating to Standard's 1967 U. S. results:

> Income improved moderately in the latter half of 1967 due to improvements in housing construction but the increase in earnings was mainly due to the inclusion of the Mosler Safe Company's operations since date of acquisition in May 1967. Mosler sales since acquisition in 1967 amounted to $51,249,000.

Crane asserts that this statement is misleading because there was no increase apart from Mosler, and the statement erroneously gives the impression that Standard's 1967 domestic earnings apart from Mosler improved over 1966, whereas in fact they declined by $1,055,000. While the statement might have been better phrased than by the use of the words "mainly due," it does convey a sufficiently accurate picture of Standard's American operations so as not to mislead. The proxy statement does not claim that each and every phase of the operations of Standard improved in 1967. The statement explicitly says that income declined during the first half of 1967 and reports a modest improvement in the second half due to the inclusion of Mosler's operations in the second half. Such inclusion of the operations of a consolidated subsidiary is accepted accounting practice. SEC Regulation S-X, Rule 4-02. The benefit obtained through the acquisition was a part of Standard's true picture for 1967.

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20 If the amount which would otherwise be required to be shown with respect to any item is not material, it need not be separately set forth in the manner prescribed.

Crane further maintains that 1967 earnings were overstated by 25 percent by failing to charge foreign currency losses of $3,333,000 against income, citing Rule 3-09 of Regulation S-X. This claim is not well taken. The $3,333,000 item was an unrealized loss which had not yet been taken by conversion of the foreign currencies into U. S. dollars. The facts as to the unrealized 1967 foreign exchange loss were fully disclosed in the proxy statement. The amount of the loss was stated and the account to which it was charged was specified.[21] The loss was charged against a reserve which had been specifically set up to absorb such losses and gains, a method of accounting which had been followed by Standard since 1959. There was testimony by Standard's accountants and experts that the reserve was properly created in accordance with generally accepted accounting principles to cover the unrealized effects of foreign currency valuations. The District Court accepted this testimony as against appellant's claims.[22] Crane has not established that this finding was clearly erroneous.

Crane's contention that the Accounting Principles Board Opinion No. 9 requires a different result is not sustain-

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21 Note 1 to the consolidated statement is as follows:

> The financial statements of the consolidated foreign subsidiaries have been converted to U. S. dollars at year-end rates of exchange. . . . Unrealized exchange losses principally in England and Brazil aggregating $3,333,000 in 1967 were charged to the Reserve for Foreign Operations.

22 "I find the plaintiff's expert testimony did not refute this by a fair preponderance of the evidence. The best that emerged from all the testimony on the subject seemed to be that the accounting profession is desirous of establishing uniformity in reporting such losses or gains, at least to stockholders, and that they advocate that these losses be taken against and gains credited to income rather than to a reserve as reflecting a truer picture."

able.[23] The opinion does indicate a concern that such losses pass through the income statement for the applicable year. Such a concern with reflecting the results of operations of a corporation during a particular period of time does not require departure from Standard's method here, where the losses were unrealized, a reserve had long before been created from the results of past earnings, the treatment had been consistent for many years, and there was expert opinion testimony that there is no principle of accounting which requires any other treatment in light of the particular reserve created. This is not a situation where a company utilized the reserve to mislead, reporting favorable items in the income statement and unfavorable items as direct charges to earned surplus without adequate comment elsewhere. Crane's contention that the 1967 earnings were misleading regardless of compliance with generally accepted accounting principles cannot be sustained. If the deviation was not properly an item of profit or loss in 1967, there was no material exaggeration of the trend of Standard's earnings. Compare *Kaiser-Frazer Corp.* v. *Otis & Co., supra* n. 18. Since the facts as to the unrealized 1967 foreign exchange loss were adequately discussed in the proxy statement, there is not here any misstatement or omission which would influence the stockholder's vote. See *Miller* v. *Steinbach, supra,* n. 16.

Crane's second charge against the proxy statement is that Air Brake's management falsely stated to the shareholders its reasons for recommending the merger and falsely stated that careful consideration had been given to the merger. See *SEC* v. *Okin*, 137 F.2d 862 (2d Cir. 1943). The "due consideration" claim stems from the following statement in the letter of transmittal attached to the face of the proxy:

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23 Compare, *Norte & Co.* v. *Huffines*, 288 F. Supp. 855 (S.D.N.Y. 1968).

> The number of shares of American-Standard to be received by WABCO shareholders upon the merger, the provisions of those shares, and all other terms and provisions of the merger were agreed to by the two companies after careful consideration of, among other things, the earnings, market prices and book values of the respective stocks, and the dividend and conversion privileges of the American Standard stock to be issued to the WABCO shareholders.

As to this claim, the District Court found as follows:

> The evidence discloses that the proxy statement approved by the Commission gives evidence of much thought, as do the extraordinary pre-solicitation letters of McCord to the stockholders. . . . [B]eginning the middle of July, 1967, Air Brake secured and obtained and acted upon the advice of its accountants, house counsel and general counsel and the advice of a proxy solicitation public relations firm and were preparing to resist the attempts of Crane to force a merger of Air Brake with Crane. Each step taken by Crane and each step taken by Air Brake was carefully thought out and planned. The stakes were high and their steps were measured and weighed before they were taken. . . . Suffice it to say that there has been no hint and no evidence of any improper motives. Certainly the prevention of a takeover of the company is not actionable unless the law has been violated and I find no federal statute or rule has been violated.

The finding of "due consideration" is supported by the record. McCord testified that as early as December 1967 he received a preliminary inquiry from Standard's president concerning the possibility of a merger. McCord met

with Air Brake's board of directors on January 22 and February 7, 1968, at which meetings the desirability of merger talks with several companies was discussed. The board specifically authorized McCord to proceed with detailed studies of the consequences of a merger with Standard, or alternative companies, and at the February 7 meeting the board authorized McCord to determine what value Standard would place on Air Brake shares in the event of an exchange offer. On February 19 Standard made its first suggestions as to possible terms of merger. McCord met with three of Air Brake's ten directors the following day. At that meeting Mayer produced charts detailing Standard's markets, sales records and profit margins, accompanied by Mayer's comments that Standard was not in any more attractive line of business than Crane. This had been confirmed by the Kearney report of January 15, reference to which was omitted in the discussion. Nonetheless, the directors were impressed with the high valuation offered for Air Brake stock, $50 per share, and authorized McCord to negotiate the merger. Finally on March 4, the Air Brake board reviewed the provisions of the preliminary merger agreement in detail. A report prepared by the financial vice-president of Air Brake was distributed to each director, as was a general statement written by McCord. McCord reported to the board that he had discussed Standard's operating program with Standard's president, Mr. Eberle, and that Standard had generally reached their objectives. The board discussed such subjects as the proposed conversion ratio, the market price of Standard stock, Standard's price-earnings ratio, the opportunity to increase the profitability of Standard, and the future earnings of Air Brake stockholders.

The facts emphasized by Crane do not compel a different conclusion. Crane argues that the effect of the merger would be to increase the concentration of Air Brake's shareholders' investment in plumbing and heating supplies. The proxy statement, however, did not represent that the merger would result in greater percent-sales-per-product-line diversification. It only stated that the board "believes that the merger . . . [will provide Air Brake shareholders with] interests in new manufacturing and marketing fields in which WABCO is not presently engaged."[24] Crane's further argument is that the board on March 4 had no advance preparation for the hastily called meeting of seven of the ten directors, and those present exercised no independent judgment but merely relied on McCord's representations. McCord himself admitted that he did not point out at the meeting that the report prepared by Eberle indicated that Standard's net income for 1967 was about $5,000,000 less than planned. Nonetheless, such allegations fall far short of a deception practiced upon the corporation or a failure to exercise the care required of the directors as

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24 The full text reads as follows:

Your Board of Directors believes that the merger with American-Standard will benefit shareholders of WABCO by providing them, on a favorable basis, interest in new manufacturing and marketing fields in which WABCO is not presently engaged. American-Standard is an international producer of building products, industrial and technical products, and bank, security and office systems. Upon the joinder of those businesses with WABCO operations, the resulting company will have an established position in the industrial world in the combined, broader based lines of business under competent management; will have available greater resources for expansion and research and will have more diversified sources of business and income. It is believed that these conditions should enhance the value of the holdings of shareholders of WABCO and the dividends on their shares to a greater extent than could be achieved by WABCO alone.

fiduciaries.[25] The circumstances surrounding the merger negotiations do not indicate that the directors were without a reasonable basis in fact for their recommendation. See Leavell, *Investment Advice and the Fraud Rules*, 65 Mich. L. Rev. 1569 (1967); *SEC* v. *Okin, supra.*

Crane also argues that the proxy statement falsely states the basis for the recommendation, and fails to disclose that the recommendation was a product of an unjustified design to prevent Crane from acquiring control. Crane points to statements by McCord that he concluded on January 3 that it was Air Brake's interest to remain independent, but by February 20 he had come to the conclusion that if necessary to prevent a takeover, Air Brake should merge with another company. McCord, however, also stated that a takeover of Air Brake by Crane would have a marked effect on the business and management of Air Brake since the Crane management was not the equal of Air Brake's.

The District Court found that there were no improper motives underlying the action of the Air Brake directors. Moreover, it is sufficient that the relevant facts were fairly stated in the proxy statement.[26] The proxy statement clearly pointed out that the board of directors opposed the Crane takeover, and that certain Air Brake personnel would be employed with Standard after the merger.[27] Crane

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25. Compare, *Ruckle* v. *Roto American Corp.*, 339 F.2d 24 (2d Cir. 1964); *O'Neill* v. *Maytag*, 339 F.2d 764 (2d Cir. 1964); *SEC* v. *Texas Gulf Sulphur Co., supra* at 401 F.2d 833 (2d Cir. 1968); cf. *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963).

26 See *Doyle* v. *Mitton*, 73 F. Supp. 281, 285-86 (S.D.N.Y. 1947); *Laurensano* v. *Einbender*, 264 F. Supp. 356 (E.D.N.Y. 1966).

27 "Crane Company is making an offer to exchange your WABCO shares for subordinated debentures of Crane Company. This represents the latest step by Crane in its campaign to take over control of your company. We must make certain points very clear:

(continued on following page)

has not shown that the proxy statement under all the circumstances is false or misleading with respect to any material fact, i.e., a fact that would influence the stockholders to act differently if disclosed. We agree with the District Court that the directors did not breach their duty of disclosure with regard to the proxy statement.

We affirm the District Court's dismissal of the claim as to the Air Brake proxy statement; we reverse the judgment below dismissing the claim based upon market manipulation and deception, and remand for a further determination in the District Court of the appropriate remedies. Without limitation, these remedies may include damages, if any, prospective injunctive relief, as well as appropriate retrospective relief, notwithstanding the consummation of the merger. See *J. I. Case Co.* v. *Borak*, *supra*. The manipulation may be found to have deprived Crane of success in its tender offer in the free market to which it was entitled, in which case divestiture or separation of Air Brake may be required. Consummation of the transaction cannot be allowed to preclude any relief for violations of the securities laws.

We do not suggest that such a drastic result as divestiture or separation must necessarily be reached in this case.

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(1) This offer was not negotiated with your management.

(2) If you tender your shares to Crane, you are irrevocably bound. You may not withdraw your shares if you change your mind or wish to sell. In contrast you may vote the enclosed proxy for the American-Standard merger and are still free to revoke your proxy or sell your shares or accept Crane's offer.

* * * * *

It is contemplated that the business conducted by WABCO prior to the consummation of the merger will be continued thereafter by the present personnel of WABCO in a new wholly-owned subsidiary of American-Standard which will be named Westinghouse Air Brake Company."

Crane must establish that any relief sought is equitably required, considering the effect on other shareholders and the diligence with which Crane sought to prevent consummation of the merger and to obtain delay in its implementation pending expeditious review of the denial of injunctive relief by the trial court. See discussion in *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 947-48 (2d Cir. 1969).

APPENDIX B

Opinion of the District Court

Crane Co. v. American Standard Inc., et al.

United States District Court, Southern District of New York. 68 Civ. 1845. June 5, 1968. Opinion of the court in full text.

RYAN, District Judge: Gentlemen, I am prepared to dictate my decision upon the record. It is a decision hurriedly prepared from the notes that I made during the trial and the notes that I made as I read the depositions which were received in evidence. I dictate it now on the record because I know the urgency of the entire situation and of the desire of the plaintiff to take immediate steps as it may deem advisable, or may desire for the protection of its rights. I think the best way and the most expeditious way of putting the matter in position for immediate appellate review is by deciding the case right now, and I am prepared to do so.

[*Background*]

The actions which are now consolidated and before the Court were filed against defendants to obtain a declaration that certain proxies for the voting of certain shares of Air Brake stock, procured by defendants and others acting in concert with these defendants, are null and void.

The consolidated complaint seeks to enjoin defendants from voting these proxies and from giving effect to any merger between Air Brake and American Standard.

On March 5, 1968, by a letter to its stockholders, Air Brake announced that its directors had, after careful con-

sideration, agreed with American Standard to merge Air Brake into American Standard, upon the approval of the stockholders of both companies at meetings of their respective stockholders which were to be held and had been scheduled for May 16, 1968.

Air Brake was organized under Pennsylvania law and approval by a majority of its outstanding voting stock is required to effectuate any merger.

Crane, the plaintiff, itself desirous of merging with Air Brake and of obtaining representation on its board, had begun to purchase stock of Air Brake in June, 1967, and by December, 1967, Crane had almost a 10 per cent interest in Air Brake which was then sufficient to insure the election of one director.

However, on December 7, 1967, Air Brake changed its by-laws to require, in effect, that a 25 per cent interest was necessary to elect one director. Crane has continued to acquire shares of Air Brake since June, 1967, and at the time of the trial, when the trial began, had over 25 per cent interest in Air Brake, and these holdings increased and continued to May 28, 1968. There is in evidence a detailed statement of Crane's acquisitions and holdings; as of April 2, 1968, Crane owned 672,100 shares of Air Brake stock, and from that date to May 2, 1968, Crane acquired an additional 531,285 shares.

[*Complaint*]

We now turn to examine the complaint, as it has been consolidated. The first two counts of the consolidated complaint are directed primarily against Air Brake, and the third count is directed primarily against American Standard and the brokerage firm of Blyth & Company who acted as American Standard's broker.

[*Exchange Act Claims*]

The first count brought individually and on behalf of Crane, and derivatively on behalf of Air Brake, alleges that the Air Brake proxy statement dated April 18, 1968, violated Section 10(b) and 14(a) of the Securities Exchange Act of 1934 (15 U. S. C. Sections 78i(b) and 78n(a), and Regulation 14(a) and Rule 10(b)(5) because it omits three facts, it alleges, which should have been included in the proxy statement and were omitted, which are:

(1) That the purpose of the Air Brake-Standard merger was to avoid a takeover of Air Brake by Crane;

(2) That Crane and Standard are substantial competitors; and

(3) That Air Brake had received a letter from the Department of Justice inquiring about the proposed merger with Standard and takeover efforts of Crane.

Now, we should note at this stage—I do note and I find—that the proxies and votes in question here relate to the annual and special meetings of the stockholders of Air Brake which were scheduled for May 16, 1968, and that among the matters which were to be voted upon and were noticed to be voted upon are the election of directors of Air Brake and a proposed merger of Air Brake with American Standard. Crane has nominated three candidates for directorship and has filed appropriate forms with the SEC for the solicitation of Air Brake stockholders. Neither Blyth nor American Standard has filed such registration, nor have they filled out such forms which are required, if they are soliciting stock proxies and votes. Crane has opposed the merger with American Standard and has made a tender

offer to Air Brake stockholders offering to buy Air Brake stock.

[*Section 10(b) Violation Charged*]

We return now to the complaint. We come then to the second count of the complaint. Here it is pleaded individually on behalf of Crane that the omissions in the Air Brake proxy statement constitute a violation of Section 10(b) of the 1934 Act and of Rule 10(b)(5) promulgated thereunder.

The Court at pre-trial hearings held on May 8, 1968, propounded certain interrogatories to the plaintiff. The plaintiff, by its answers to these interrogatories, which were served on May 11, 1968, stated that Air Brake's proxy solicitations violated "Section 14(a)(9) of the Act for the additional reasons that (1) the letters from A. King McCord, Air Brake's chairman, to Air Brake's shareholders dated December 13, 1967, December 16, 1967, and March 5, 1968, were false and misleading, and (2) Air Brake's proxy statement was misleading with respect to American Standard's 1967 income, with reference to the possibility that American Standard would sell as well as purchase American stock in the market and that the pro forma statement of the capital assets of the combined companies, as stated, were false and misleading.

[*Other Violations*]

The third count of the consolidated complaint charges that American Standard and its agent Blyth & Company violated Rules 14(a)(3), and 11 of the Proxy Rules and Sections 9, and 10(b) of the Securities Exchange Act of 1934.

It also charges violation of the statutes of the Commonwealth of Pennsylvania and of the common law in the following ways. These ways are stated to be by solicitation by Air Brake of proxies for use at the Annual Meeting of Air Brake without having filed the information specified in Schedule 14B of the proxy rules, and by directly soliciting proxies without having filed the information specified in Schedule 14B of the Proxy Rules and without having furnished to the persons solicited a proxy statement; and by purchasing proxies and votes of stockholders of Air Brake which is alleged to be an act in violation of the laws of Pennsylvania.

It continues with these further specifications of violation of the law, and it alleges, in substance, that American Standard violated the rules, the proxy rules and the applicable federal law, by failing to disclose in the proxy statement that had been filed by Air Brake, that they had violated or would violate State law by purchasing proxies and votes from stockholders of Air Brake and by stating in the proxy statement that American Standard would purchase shares of Air Brake and omitting to state that it would purchase thousands of such shares at a premium and sell or dispose of thousands of such shares at a discount and purchase proxies and votes—thereby illegally incurring substantial expenses which would, if the merger of American Standard and Air Brake for which the said proxies and the votes were solicited and bought is approved, be borne largely by Air Brake's present stockholders, all in violation of Proxy Rule 14a-9.

[*Manipulations*]

This count in the complaint further alleges that the defendants, by manipulating and inflating the market price

of Air Brake with a view to frustrating and impeding the outstanding tender offer of Crane under which Crane sought to acquire all the stock of Air Brake, and by not revealing these facts in the proxy statement concealed material facts from the stockholders of Air Brake, all in violation of Sections 9, 10b and 14 of the Act.

[*Specific Violations*]

The violations by American Standard and Blyth Company, according to Crane, took the following form. They are detailed and specified by Crane as follows:

American Standard and Blyth systematically purchased shares of Air Brake from arbitrageurs of Air Brake which shares would normally flow to Crane in response to its offer. This was a purchase from Beer, Stearns & Company in which American Standard used its own funds. American Standard and Blyth, in order to secure immediate delivery prior to record date, are charged with having paid above the market price, and it is charged that American Standard sold shares of Air Brake to purchasers who committed themselves to vote in favor of the merger and that sales were made below the market price because the purchaser gave up its voting rights as requested by American Standard, or because delivery date was delayed beyond the record voting date.

These sales, it is charged, had been made to IDS of 100,000 shares; to Dillon Read & Company of 20,000 shares; and to Goldman, Sachs & Company of 35,000 shares. In addition, it is charged by Crane that Blyth & Company participated on behalf of American Standard in a sale by a Pittsburgh bank to Salomon Bros. & Hutzler on similar conditions. Because American Standard was engaged in

concurrent purchases and sales of Air Brake stock, plaintiff charges that it was engaged in nothing more than the buying and selling of votes and in transactions and that this was an expensive proposition to stockholders of Air Brake, American Standard and, therefore, to the proposed merged corporation, and that this activity caused an artificially high price in the Air Brake stock which was available to Air Brake stockholders if they sold to American Standard rather than to Crane.

Urging that the failure to disclose these activities in the proxy statement was an omission of great materiality to the stockholders of Air Brake, plaintiff would void the entire proxy statement issued and thus invalidate the entire vote cast at the special meeting of Air Brake.

We pause here to note that on May 16, 1968, American Standard was the beneficial owner of 459,622 shares of Air Brake stock which, of course, was voted in favor of the merger.

[*Complaint Dismissed*]

I find from the evidence that plaintiff has failed to sustain its burden of proof and I conclude that the consolidated complaint must be dismissed and judgment be entered for all defendants on the merits.

[*No Arrangement with Broker-Dealer*]

I first consider the claim against Blyth & Company. There was an absolute failure of proof to support the charge that Blyth & Company was engaged in soliciting proxies on behalf of American Standard. The Chairman of the Board testified that it had a blanket order from American Standard to purchase and sell Air Brake stock.

on its behalf at the best price, the only limitation being that American Standard did not at any time own more than 10 per cent of the Air Brake stock. There was no evidence that there was any arrangement whereby the purchaser of the stock from Blyth & Company at its request committed itself to voting its stock in a certain way. But even if there had been, this would not constitute solicitation of votes by either American Standard or Blyth in its behalf, nor would it be in violation of federal statute or rule with which this Court is alone concerned.

[*No Proof of Conditional Buying and Selling of Shares*]

I next consider the claim against American Standard. I find there is no proof that American Standard had been buying or selling Air Brake stock conditioned upon the granting or reservation of voting rights. The fact that American Standard bought shares of Air Brake in order to vote in favor of the merger and that it sold to persons whom it hoped would vote in favor of the merger either to obtain money to purchase stock or to keep its holding below a 10 per cent control interest does not constitute a purchase of votes independent of the stock to which the votes belong.

[*Registration for Solicitation of Proxies*]

Plaintiff cites Rule 14a-11 of the Proxy Rules in support of its charge that American Standard failed to register as a solicitor of proxies. This rule by its very language applies only to a solicitation with respect to the election or removal of directors for the purpose of opposing a solicitation. The proxies were for a vote on a proposed merger;

they were not sought in connection with the election of directors of Air Brake and there was no opposition solicitation by American Standard within the rule cited. Neither was there proof that American Standard was participating in a solicitation.

Plaintiff's argument that the merger was nothing more than a step to retain in control the directors of Air Brake and that the solicitation was in reality one for the election of directors is based upon an unsupported conclusion as to defendants' motives with which this Court is not concerned.

Even if American Standard, while it was the record owner of stock and at the time it sold the stock, has requested the purchaser to vote the stock a certain way, there would have been illegal solicitation, for, as the owner of its stock, it had absolute control over the voting of that stock.

However, at no time did American Standard sell stock without the accompanying vote. But, even if it had, this would not have constituted a solicitation for purposes of federal regulation.

In the same way, assuming American Standard, through Blyth & Company, was actively engaged in acquiring Air Brake stock solely, as I have noted, in order to vote it in favor of the merger, I find nothing illegal about it. This was the very thing that plaintiff Crane was lawfully doing when it made its tender in order to oppose the merger.

Since American Standard was not engaged in soliciting proxies, there was no omission of a material fact in the proxy statement of Air Brake. The charge of falsity predicated on this third count has not been established.

[*Frustration of Takeover Bid*]

I come to the charges of falsity in the proxy statement made against Air Brake. It is charged, first, that the Air Brake management failed to disclose that one of the reasons, if not the sole reason, for Air Brake's recommendation of the American Standard merger was to forestall Crane from acquiring control of Air Brake and to insure the continuance of Air Brake's present management.

The defendant Air Brake has denied that this was the reason for the recommendation, and plaintiff has failed to establish its contention to the contrary. This assumes that this was a material fact disclosure which is required under Section 10B or Section 14A. I do not find that this is so. The securities laws are concerned with the facts presented to the stockholders, not with the motives underlying these facts.

As was observed in *Laurenzan* v. *Einbenbender*, 264 F. Supp. 356, Section 14(a)(c) "exacts candor of disclosure, not fairness of substantive terms."

But, more significant is the fact that the attempted takeover by Crane as well as the fact that Air Brake's personnel would continue to be employed after the merger was clearly set forth in the proxy statement.

Thus, on page 2 of Mr. McCord's letter to stockholders of Air Brake, which letter enclosed the proxy statement, we find the following prominently featured:

"WARNING

"Crane Co. is making an offer to exchange your WABCO shares for subordinated debentures of Crane Co.

"This represents the latest step by Crane in its campaign to take over control of your company.

"We must make certain points very clear:

"(1) This offer was not negotiated with your Management.

"(2) If you tender your shares to Crane, you are irrevocably bound. You may not withdraw your shares if you change your mind or wish to sell. In contrast you may vote the enclosed proxy for the American Standard merger and are still free to revoke your proxy or sell your shares or accept Crane's offer."

At page 37 of the proxy statement, a statement is made concerning the details of the controversy with Crane Co. over the merger. This proxy statement is in evidence and there is no need for me to set it forth at length in this opinion.

In addition, on page 6 of the proxy statement of Air Brake we find the following statement made:

"*Management of WABCO after Merger*

"It is contemplated that the business conducted by WABCO prior to the consummation of the merger will be continued thereafter by the present personnel of WABCO in a new wholly-owned subsidiary of American Standard which will be named Westinghouse Air Brake Company. . . ."

It is apparent, therefore, that all of the facts from which Crane erroneously deduces improper motives were fully disclosed to Air Brake's stockholders.

[*Competition Between Suitors*]

Then Crane complains that there was a wrongful failure to disclose the fact that Crane and American Standard are

substantial competitors and that Air Brake did not disclose a Department of Justice letter of inquiry.

[*Potential Antitrust Liability*]

Crane contends that Air Brake's directors should have stated in the proxy material that American Standard and Crane are substantial competitors, and that Crane, as the largest stockholder of Air Brake, might expose the merged company to antitrust liability, and that this situation had provoked an inquiry from the Antitrust Division, and that this was a material fact and, therefore, should be and would be a consideration as to whether the merger should be approved.

The answer to this contention is that the law does not require the management in a proxy statement to attempt to prophesy all the remote, uncertain or possible consequences, beyond their control, of the proposed merger. The fact that Crane was the largest stockholder in Air Brake might or might not have some antitrust effect on American Standard. At the time of the proxy statement, no action had been instituted or threatened by the Department of Justice and we have no evidence that any such action has been filed. Therefore, it would have been rash on the part of Air Brake's to discuss the possibility of any such action, absent good reason and cause for doing so.

The Securities Commission itself in a letter to American Standard dated April 2, 1968, outlined the events which would require disclosure in this language:

> "If any notice has been received by any parties to the merger agreement from any Federal authority with respect to any action instituted or contemplated relating to, restraining or prohibiting the proposed trans-

action, disclosure should be made in the proxy statement."

It is also significant that if Crane was the largest stockholder it was by deliberate action taken continuously and after the proxy statement had been circulated. Since Crane was active against the merger, it is not unlikely that it would, if occasion required, exercise its right to have the stock appraised in court and then remove this claimed obstacle to any merger.

The letters of McCord, the chairman of Air Brake, to its stockholders of December 13th and 16th, 1967, warning the stockholders of the growing accumulation of Air Brake stock by a nominee later revealed to be Crane, even if part of the solicitation, were not false and misleading. These letters fully advised the stockholders of Air Brake of the situation with respect to Crane and its acquisition and holdings, to the extent that Air Brake had such knowledge.

[*Accounting Methods Proper*]

Finally, I came to Crane's attack on the accounting methods employed by Air Brake to state American Standard's 1967 earnings and particularly the statement that the earnings for this year are stated to be $1.30 per share, when in truth and in fact, they should have been stated as 97 cents a share.

Plaintiff reaches this lower figure by charging that proper accounting methods required that unrealized foreign exchange losses of consolidated foreign subsidiaries be charged against net income rather than against the reserve which had been specifically set up to absorb such unrealized losses and gains.

This was a method of accounting, which had been followed by American Standard since 1959 and was dated back to be effective from 1954 and has been continued to date.

It is contended that because of an amendment to a rule or regulation of the Society of Accountants there should have been a change made effective for the calendar year 1967.

I find that such a change was not required or made necessary in the proxy statement in order to give the stockholders of Air Brake a full, complete, accurate and truthful picture of the financial status of American Standard or of Air Brake. There was testimony of American Standard's accountants, a reputable accounting firm that had long been auditing the books of American Standard, and of experts called by American Standard that the generally accepted accounting procedures followed by these companies and similar procedures have been followed and are being followed by other companies.

I find the plaintiff's expert testimony did not refute this by a fair preponderance of the evidence. The best that emerged from all the testimony on the subject seemed to be that the accounting profession is desirous of establishing uniformity in reporting such losses or gains, at least to stockholders, and that they advocate that these losses be taken against and gains credited to income rather than to a reserve as reflecting a truer picture. There was no criticism by plaintiff's expert witnesses of the setting up of this reserve in 1959.

Then plaintiff attacked a statement that American Standard's final results improved in 1967 after a two-year decline because it failed to disclose that this was the result

of a combination of non-recurring loss and the consolidation of a foreign subsidiary which produced extraordinary income.

I find that the credible testimony was that the method used by American Standard was according to generally accepted accounting procedures and presented a true financial picture...

[*Depositions Review*]

The balance of plaintiff's charges of omissions and misstatements I find to be without substance. The evidence discloses that the proxy statement approved by the Commission gives evidence of much thought, as do the extraordinary pre-solicitation letters of McCord to the stockholders, and here I should make note of the testimony which is disclosed in the depositions which were received in evidence. There is no question but that beginning at least in the latter part of May, 1967, or the beginning of June, 1967, Crane set out upon a program and began a program of stock acquisition and other activities designed to further and to accomplish a merger, if at all possible, between Crane and Air Brake. It also appears from these same depositions that Air Brake's management was fully advised of the efforts of Crane to effect a merger at least beginning around the middle of July, 1967, and that just as Crane had been acting through its chairman, Evans, with the advice of counsel and of accountants, so then, beginning the middle of July, 1967, Air Brake secured and obtained and acted upon the advice of its accountants, house counsel and general counsel and the advice of a proxy solicitation public relations firm and were preparing to resist the attempts of Crane to force a merger of Air Brake with Crane.

Each step taken by Crane and each step taken by Air Brake was carefully thought out and planned. The stakes were high and their steps were measured and weighed before they were taken. Each circular, each instrument, each paper, each act I find was taken only after consultation and advice. Under these circumstances, being put upon their guard that the actions of each were being watched, they were extremely careful in what they said and did. I think that care guided them throughout all the statements and all their activities.

We might make the same observation with reference to American Standard. The depositions disclosed that from around the middle of March, 1968, when American Standard first evinced a definite interest in effectuating a merger with Air Brake, it, too, sought the advice of counsel, of a banker and it, too, sought the advice of an accountant and particularly did it pay attention that the acquisitions and purchases should not place it in the position of one being placed in an interest. However, whatever the true motives of management of Air Brake might be in recommending the merger of Air Brake with American Standard rather than Crane is of no concern to this Court. Suffice it to say that there has been no hint and no evidence of any improper motives. Certainly the prevention of a takeover of the company is not actionable unless the law has been violated and I find no federal statute or rule has been violated.

[*Conclusion*]

The complaint is dismissed upon the merits. The clerk is directed to enter forthwith a judgment in favor of the defendants upon the merits with taxable costs and disbursements, and it is so ordered.

I think at this time, gentlemen, I should express my thanks and my appreciation to each and every one of you for the cooperation you have given me in the conduct of the pre-trial proceedings had in this matter and in the trial itself, and for that I'm grateful to you. Thank you.

APPENDIX C

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Opinion of the District Court Denying Motion for Preliminary Injunction

The Court: I recognize, Mr. Castles, ordinarily you would be entitled to an extended opinion denying relief of this nature because it is an appealable order. I haven't had the time to write out any opinion.

I have indicated to you, however, that I have read all the depositions which were submitted in evidence last Wednesday. I did so yesterday. I have indicated to you that it was quite evident from the depositions that I read that all of the parties from the time they became interested in this matter acted on the advice of counsel. It is apparent that the Crane Company and Mr. Evans, acted under the advice of counsel, both legal counsel and accounting counsel, at least in the beginning of June, 1967.

It is apparent, too, from the deposition of I think the president or chairman of the board of Westinghouse that at least from July 10 or 15, I don't remember the exact

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date, about that time, Westinghouse Air Brake was consulting with house counsel, general counsel and accountants and representatives of Jorgenson Company, the proxy advisers, and these conferences were all directed with the idea of protecting themselves against committing any violation of the law with relation to the possibility of any pending contest which might arise with either the Crane Company or anybody else, and that each step that they took, each step that Westinghouse took, was guided, Mr.

McCord testified, by advice of legal counsel, accounting counsel and, I might say, public relations counsel, so that the law would not be violated and public relations would not be offended.

Though the evidence isn't as full and in as full and in as great detail as concerns Westinghouse, it is apparent that that same course was followed by Evans and by Crane Company.

The evidence is, too, that beginning around the 15th of March of 1968, when American Standard evinced a definite interest in a possible merger, that they, too, had the advice of counsel, particularly so their holdings would

not exceed 10 per cent, making them a controlling interest subject to special laws and special regulations, and that in each step they took they too were guided by advice of counsel and by accounting advice.

This becomes especially important with reference to Westinghouse Air Brake and with reference to American Standard, because it is quite evident that at least Westinghouse Air Brake in preparation of their report on the stockholders' meeting at which the merger was to be voted upon prepared themselves with meticulous care and with a special view so that the provisions of the federal laws should not be violated.

The same observation, I think, might well be made of the notice to the stockholders which went out to the stockholder American Standard concerning their meeting at which the proposed merger was voted upon.

Mr. Castles: Your Honor, your statement with reference to meticulous care, did that refer to the proxy statement of the Air Brake Company?

The Court: That refers to the two statements and to all their actions, statements which for convenience I

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might describe as being statements which are annexed, the ones that I already found ready access to, were annexed to the affidavit which Mr. Pomerantz at one time submitted of Thomas M. Evans. There is a statement there of Westinghouse on this meeting, on which votes were cast on May 16th, and there was also a printed—I don't see where that is now, it must be upstairs. You know the two statements I refer to.

Mr. Castles: That is what I wanted to be sure of. Was your Honor's statement that meticulous care was used in the preparation of

The Court: Meticulous care was used in connection with every step that they took.

Mr. Castles: Including the preparation of the proxy statements?

The Court: Including the preparation of the proxy statements, yes, no doubt about it, from the time they evinced an interest. There were different stages where that preparation began. I think it began with Crane in June, 1967. Mr. Evans seemed to indicate that. It began with Westinghouse Air Brake around July 10th or 15th, I forget the exact date, of 1967, and he said he had definite

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information. In fact, Evans had told the chairman of the board of Mellon Bank that he had a certain substantial amount of holdings, and it is evidenced here from a statement that was submitted that at that time he did have approximately 50,000 shares that had been accumulating.

It also appears from the evidence that American Standard Plumbing, when they evinced a definite interest in the possibility of a merger, which was around the middle of March, 1968, I think it was the middle of March—you

are more familiar with the dates than I am—that from that point on every step they took was guided by advice of counsel.

Mr. Castles: Yes, sir.

The Court: Those are the conclusions and inferences which seem to me to be irresistible from the evidence presented and from the reading of the depositions which have been received in evidence.

Mr. Castles: Yes, sir.

Your Honor, I want to proceed to a point. I think it is Rule 10 of the local rules which provides that the order of the Court must be embodied in a separate document.

The Court: If you have an order, I will endorse it.

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Mr. Castles: Is it necessary to submit such an order? I seem to remember there is a case which holds that a mere endorsement on the applications—

The Court: The trouble is that I don't have time to write an extended opinion; and I have held up the decision in this matter. When I say "this matter," I mean the application for an injunction has been held up pendente lite. My reasons are set forth in my observations made here now. My present inclination is not to disturb what I think is the natural status quo, and the natural status quo is to leave things go ahead the way they have been.

Have you other papers here on this? If they are here, maybe I will make such an endorsement on their back.

(Discussion off the record.)

The Court: Mr. Castles, you read just before we adjourned this morning from your statement of the holdings of Crane. It might be well if you could have that typewritten and put in evidence as a written statement on Monday, as a statement which you claim are the holdings.

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Do you remember the paper you read from?

Mr. Castles: Yes, I do.

The Court: Your statement is in the record.

Mr. Barnum: In that connection, could we have it clarified whether that purports to be a statement of all the shares of Westinghouse Air Brake tendered and accepted by Crane Company?

The Court: I understood that it was.

Mr. Barnum: I understood it should be, but I noticed there were no tenders subsequent to the 2nd of May listed on that particular sheet. I think we are talking about Exhibit 1-A.

Mr. Castles: We are talking about the statement I read into the record.

The Court: Exhibit 1-A shows that beginning on April 15, according to the statement that was presented, there were additional shares acquired under the Crane offer totalling 531,285 shares.

Then I understood from Mr. Castles' statement that there were additional stock ownership acquisitions after

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the last entry on this acceptance offer of May 2nd which brought that total up.

Mr. Castles: Yes, there are additional acquisitions.

Mr. Barnum: Then I don't understand the purpose of Plaintiff's Exhibit 1-A.

The Court: Exhibit 1-A simply shows the additional amounts up to May 2nd.

Mr. Barnum: Can we have that supplemented so it is a complete exhibit with respect to all shares tendered?

The Court: Yes, that is what I had in mind, because it was after Exhibit 1-A was received in evidence that Mr. Castles read from a yellow sheet of paper, apparently

the result of some telephonic communication. I suggest to him it would be preferable if he would have that transcribed and typewritten so that we could annex it to Exhibit 1 and we will call it 1-B. Then we will have a continuity of acquisition.

I have the two papers I was looking for. One is the order to show cause of May 15, 1968. I can endorse that.

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The Court: Suppose we take a recess and we will do it inside. You lawyers can come inside.

(Recess.)

The Court: Gentlemen, I have hurriedly written out an endorsement which I would like to have transcribed. You will have an endorsement which will be in the nature of an order annexed to the order to show cause which I granted on May 15, 1968, at the plaintiff's request, an application in these consolidated actions.

I will read it to the stenographer and, for fear I might have misstated some evidence or misstated your position, I will permit you to call to my attention any particular portion where you feel I was inaccurate in my historical recitals. The decision that I make of course is my own and I don't want to hear argument on that, but I don't want to embody in this endorsement order any facts either historical or those representing a position taken by counsel which does not accord with the facts.

You will have in mind what I seek to accomplish here.

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I want to give Mr. Castles an order, as he is entitled to. We have been working under extreme pressure in this matter, and what has been accomplished in a very short time could never have been accomplished if I didn't have the cooperation of counsel on all sides, for which I am grateful.

My endorsement would read, and I will read it slowly:

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The attached order to show cause issued on May 15, 1968, upon application of plaintiff Crane Company in these consolidated actions. Its entry followed pretrial conferences held by this Court on May 8th and May 15th, 1968.

Upon the signing and the return of the order to show cause on May 17, 1968, the attorneys for the defendants in the consolidated actions stipulated that the certificates of merger would not be filed if the merger was found to have been approved by a 51 per cent vote of the stockholders of Westinghouse Air Brake Company at a special stockholders meeting of May 16, 1968, until the Court was notified of the impartial canvass of the vote at the special meeting of Westinghouse Air Brake stockholders. The plaintiff's attorneys also stipulated that the meeting of May 16, 1968, might proceed and all stockholders cast such votes as they might claim to be entitled to cast, subject, of course, to official canvass and subject to judicial determination as to their legal right to cast such vote.

The Court thereupon proceeded with the trial of this consolidated action upon the merits to determine whether

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permanent injunctive relief should be granted the plaintiff as prayed for in its consolidated complaint. Evidence has been heard as to these issues as the trial continued on May 17th, 21st, 22nd, 28th, 29th and 31st, 1968.

The canvass of the vote has now been completed by the impartial canvassers and defendants have expressed an intention to forthwith file certificates of merger by the corporations affected by the merger; the canvassers having reported and found that more than 51 per cent of Westinghouse Air Brake stockholders have approved and voted for the said merger. The plaintiff now asks that the tem-

porary injunction prayed for in the order to show cause be forthwith granted.

Plaintiff's motion is denied. This denial is without prejudice to any right that plaintiff may have to seek injunctive relief in any court other than a court of Federal jurisdiction, or to press any action or proceeding it may elect to file or pursue to enforce any right it may have under the laws of Pennsylvania or Delaware, the States of incorporation of the corporate entities which are

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to be merged, or of any other State.

The trial of the consolidated action has been practically completed. One expert accounting witness is to be called by plaintiff, and the trial is to be continued for that purpose and for summation of the parties on Monday, June 3, 1968.

Upon the record thus far made, I find no just cause to grant the temporary relief so sought by plaintiff, and there is no showing of irreparable injury nor, at this stage of the trial, of probable success of plaintiff.

I have briefly stated my findings which have led me to this conclusion on the trial record. If, after completion of the evidence and summation on June 3, 1968, I find that plaintiff's prayer for permanent relief should be granted, full power to enforce this relief rests with this Court.

Motion for temporary injunctive relief is denied. So ordered.

May 31, 1968.

.....

U.S.D.J.

(Adjourned to Monday, June 3, 1968, at 10:00 o'clock a.m.)

APPENDIX D

Section 10 of the Securities Exchange Act

Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. 15 U.S.C. § 78j.

APPENDIX E

Section 14(a) of the Securities Exchange Act

Sec. 14. (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title. 15 U.S.C. § 78n(a).

APPENDIX F

Rule 10b-5

Reg. § 240.10b-5. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact; or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. 17 C.F.R. § 240.10b-5.

APPENDIX G

Rule 14a-9

Reg. § 240.14a-9. (a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

Note: The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this rule:

(a) Predictions as to specific future market values, earnings, or dividends.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or in-

directly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.

(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation. 17 C.F.R. § 240.14a-9.